In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 752

THE STATE OF ALABAMA, FOR AND IN BEHALF OF AND AS TRUSTEE FOR THE DEPARTMENT OF PENSIONS AND SECURITY OF THE STATE OF ALABAMA, PETITIONER

v.

JOHN W. GARDNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR SECRETARY GARDNER IN OPPOSITION

OPINIONS BELOW

The order of the district court (Pet. 37–46) is unreported. The opinion of the court of appeals (Pet. 73–97) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1967. On September 25, 1967, the court of appeals stayed its mandate, and the stay is effective until final disposition of the case by this Court. The petition for a writ of certiorari was filed on Oc-

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tober 21, 1967. The jurisdiction of this Court is invoker under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly based its jurisdiction upon the State's petition for direct review, rather than upon Secretary Gardner's appeal from the order of the district court.

2. Whether the court of appeals was correct in sustaining the validity of the Department of Health, Education, and Welfare regulation which requires recipients to agree to take action designed to eliminate discrimination in federally assisted programs.

STATUTE AND REGULATION INVOLVED

The provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d–2000d–4, and the implementing regulation of the Department of Health, Education, and Welfare (45 C.F.R. Part 80) are reprinted in the petition (Pet. 134–135 and 98–131).

STATEMENT

This controversy involves the validity of a regulation of the Department of Health, Education, and Welfare, issued pursuant to Title VI of the 1964 Civil Rights Act, that requires the Alabama Department of Pensions and Security to assume responsibility for eliminating racial discrimination in its welfare program as a condition of continuing to receive federal financial assistance. The pertinent facts, which are set forth fully in the opinion of the court of appeals (Pet. 74–81), may be summarized as follows:

Under the HEW regulation, every State applying

for federal financial aid to a continuing program must submit a statement of compliance which (1) indicates the extent to which the State program complies with the regulation and (2) provides for methods of administration which give reasonable assurance that existing failures to comply will be corrected.[1] By August of 1965, every State, with the exception of Alabama, had submitted an acceptable statement of compliance with respect to its federally assisted welfare programs.

Representatives of HEW made an extensive effort to bring about voluntary compliance by the Alabama Department with the requirement in question. When these efforts failed, HEW initiated administrative proceedings against the Alabama Department because of its failure to comply with the regulation.[2] After a full evidentiary hearing conducted in accordance with the Administrative Procedure Act, the hearing examiner determined that Alabama had failed to furnish an adequate statement of compliance. The examiner recommended that financial aid to Alabama under the

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[1] This requirement is contained in § 80.4(b) of the regulation, (Pet. 105). The programs involved in this litigation are continuing State programs within the meaning of the regulation.

[2] On August 20, 1965, after receiving HEW's formal notice of its inability to obtain compliance by voluntary means, the Commissioner of the Alabama Department of Pensions and Security sent to HEW a letter which he described as a "statement of * * * compliance with Title VI * * *." On August 27, 1965, HEW informed the Alabama Department that its statement failed to meet the minimum standards of the regulation. The Secretary so determined in the administrative proceedings and the court of appeals sustained his decision.

programs in question[3] be terminated and that recommendation was adopted by the Commissioner of Welfare. On January 12, 1967, Secretary Gardner approved the Commissioner's decision and ordered the termination of payments to Alabama, effective February 28, 1967 (Pet. 47–72). Pursuant to Section 602 of Title VI, the order of the Secretary was transmitted to the appropriate congressional committees.

On January 13, 1967, invoking § 10 of the Administrative Procedure Act, 5 U.S.C. (Supp. II) 703, and 28 U.S.C. 1331, Alabama filed suit in the United States District Court for the Northern District of Alabama challenging Secretary Gardner's order and the underlying regulation. The government moved to dismiss for lack of jurisdiction, but, on February 3, 1967, the district court granted a preliminary injunction against enforcement of the Secretary's order. Secretary Gardner filed a timely notice of appeal.

On February 18, 1967, the State of Alabama filed in the United States Court of Appeals for the Fifth Circuit a petition for direct review of the Secretary's order. This petition was based upon 42 U.S.C. (Supp. II) 1316 and § 603 of the 1964 Civil Rights Act, 42 U.S.C. 2000d–2. Alabama continued to assert the jurisdiction of the district court, but, in the alternative,

[3] The affected programs (and their statutory bases) are the following: Old Age Assistance, Title I of the Social Security Act, 42 U.S.C. 301–306; Aid and Services to Needy Families With Children, Title IV, 42 U.S.C. 601–609; Child-Welfare Services, Title V, part 3, 42 U.S.C. 721–728; Aid to the Blind, Title X, 42 U.S.C. 1201–1206; and Aid to the Permanently and Totally Disabled, Title XIV, 42 U.S.C. 1351–1355.

sought such review as to four of the five programs if the court of appeals had sole jurisdiction.

The appeal and the petition for direct review were consolidated and set down for expedited consideration. On August 29, 1967, the court of appeals rendered a unanimous decision holding that it had exclusive jurisdiction to review the Secretary's action with respect to each of the five programs, and sustaining the validity of the HEW regulation and the decision of Secretary Gardner.

ARGUMENT

Alone among the 50 States, Alabama refused to file a statement of its willingness to comply with the nondiscrimination requirements imposed by Title VI of the Civil Rights Act of 1964 with respect to the administration of federally assisted welfare programs. The regulations of the Department of Health, Education, and Welfare, approved by the President, require such a statement and expressly make refusal to file it a basis for termination of federal assistance. The court of appeals was clearly correct in sustaining the regulation and Secretary Gardner's order terminating federal assistance for failure to comply with it. While we believe the ruling below on the jurisdictional issue was also correct, that question can in no event affect the outcome of the litigation since the court of appeals concededly had jurisdiction to review the administrative decision. There is, accordingly, no occasion for further review by this Court.

1. Petitioner relies primarily (Pet. 26–34) upon its contention that the proper forum for initial review

of Secretary Gardner's order was the district court, rather than the court of appeals upon the petition for direct review. The relevant statutes clearly provide for exclusive review by the court of appeals of administrative action with respect to four of the five programs involved.[4] The argument is, however, that because the Secretary's order also affects a related program not expressly covered by the review provisions, the whole of the order is subject to challenge in the district court. The court of appeals, on the other hand, concluded that the express grant of power to review four programs implies a like jurisdiction with respect to the fifth. We believe that ruling is correct. But, at all events, the question is of no consequence here since the court of appeals was also seized of the appeal from the district court's decision and might have rendered the same judgment under that caption.

2. Secretary Gardner's order was based upon his determination that Alabama had failed to satisfy the requirement, imposed by the HEW regulation, that the State furnish an adequate statement of compli-

[4] Section 603 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d–2, provides in pertinent part: "Any department or agency action taken pursuant to section 602 shall be subject to such judicial review as may otherwise be provided by law for similiar action taken by such department or agency on other grounds." In turn, Section 1116(a)(3) of the Social Security Act, as amended, 42 U.S.C. (Supp. II) 1316(a)(3), provides that "Any States which is dissatisfied" with administrative action under specified title of the Act—including those covering four of the five programs here involved—may "file with the United States court of appeals for the circuit in which such State is located a petition for review of such determination."

ance [5] with the obligation to operate federally assisted programs on a nondiscriminatory basis. The duty to file an acceptable plan which meets the conditions imposed by federal statutes and regulations is traditional in federal-State welfare programs and is fully authorized by Section 602 of the Civil Rights Act, 42 U.S.C. 2000d–1 (Pet. 134).[6] Indeed, it is an implementation technique expressly contemplated by Congress.[7] There is, accordingly, no basis for a broadside attack on the regulation or the order.

The primary objection which Alabama has raised pertains to the requirement that the statement of compliance covers not only State instrumentalities, but also "third parties" who provide services as part of the federally assisted welfare programs.[8] The Alabama De-

[5] Section 80.8 of the regulation (Pet. 112) provides that, in the event of a failure to provide an assurance required under § 80.4 (Pet. 103), federal financial assistance may, after appropriate proceedings, be refused.

[6] Each of the federal departments which adopted regulations implementing Title VI included a requirement that an assurance be given as a condition for the grant or continuation of federal aid. See, *e.g.*, 32 C.F.R. § 300.6 (Department of Defense); 7 C.F.R. § 15.4 (Department of Agriculture).

[7] During the congressional debate on Title VI, it was recognized that requiring written assurances or statements of compliance would be an appropriate means of administration. See, *e.g.*, 110 Cong. Rec. 7059 (April 7, 1964) (remarks of Senator Pastore).

[8] Section 80.3 of the regulation (Pet. 100) prohibits recipients (here, the State) from discriminating "directly or through contractual or other arrangements." Secton 80.5(a) (Pet. 107) states, by way of illustration, that the probitition against discrimination extends to "services purchased * * * [by the state] from hospitals, nursing homes, schools, and similar institutions * * * and to the facilities in which such services are provided * * *."

partment refused to assume any responsibility with respect to eliminating from the federally assisted programs discrimination which results from the action of these third parties. But, as the court of appeals held, there was no legal basis for this refusal. In implementing Title VI, HEW was entitled to ask Alabama to make a good faith effort to eliminate racial discrimination in all aspects of its statewide federally assisted welfare program, which includes those services and facilities provided by third parties. The good faith effort which the regulation requires would, of course, include persuasion and negotiation with the third parties; and where discrimination cannot be ended promptly by negotiation, it would also include elimination of the discrimination by substituting the use of other facilities for those of the discriminating party. As the court of appeals noted, Secretary Gardner's opinion properly required that, when nondiscrimination cannot be achieved through persuasion, "Alternate, acceptable services should be found and developed" (Pet. 93).

Alabama's refusal to comply with the regulation required the Secretary to invoke, as a last resort, the sanction of terminating assistance. A full test of the order and of the underlying regulation has been concluded, in administrative and judicial proceedings. We

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Alabama asserts that the termination order should have made an exception for the parts of the welfare programs which do not involve third-party services. This assertion overlooks the fact that, although Secretary Gardner's order (Pet. 70–71) expressly urged submission of an adequate statement regarding at least the direct-payment aspects of the programs, the State failed to do so.

submit the time has come to end the debate. Alabama will then be free to submit the required statement and prevent the withholding of funds from welfare recipients, as it has repeatedly announced it would if the regulation is upheld.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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